IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5902 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUDHA KAUSHIK @ SUDA SHARMA

Versus

UMESH PRASAD KAUSHIK S/O. JAGDISH P. KAUSHIK

Appearance:

1. Special Civil Application No. 5902 of 2004

MR HARSHADRAY A DAVE for Petitioner No. 1

SERVED BY AFFIX.-(R) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 29/01/2005

ORAL JUDGEMENT

1. The short facts of the case are that the petitioner is the wife and the respondent is the husband.

The respondent filed petition for divorce being H.M. Petition No.203/2001 in the Court of Civil Judge, Vadodara under Section 13 of the Hindu Marriage Act (hereinafter referred to as the "Act"). It appears that in respect to the summons issued by the Civil Court at Vadodara, the petitioner filed application for the preliminary issue on the question of jurisdiction being Application Ex.10 praying to decide the preliminary issue as to whether the Court has jurisdiction to entertain the divorce petition filed by the applicant therein. The respondent hrein who was the applicant in the petition filed a reply and ultimately the learned Judge trying the petition dismissed the application of the petitioner herein as per the order dated 24.4.2002 and the petitioner has approached this Court by preferring this petition challenging the said order passed by the learned Civil Judge. It also appears that the petitioner after the order passed by the learned Judge on 24.4.2002 had approached the Apex Court by preferring Transfer Petition No.710/2002 and the said petition has been dismissed by the Apex Court as per the order dated 3.2.2004 and Mr.Dave, learned Counsel appearing for the petitioner, during the course of hearing has placed on record the copy of the order passed by the Apex Court for dismissal of the transfer petition. The said order reads as under:

"Heard the learned Counsel for the parties. The transfer petition is dismissed."

It also appears that after the dismissal of the transfer petition the petitioner has appraoched this Court by preferring this petition.

2. I have heard Mr.Dave, learned Counsel for the petitioner and Mr.Kaushik, father of Respondent, who has produced the Power-of-Attorney on behalf of respondent to remain present in the Court proceedings. In normal circumstances, any citizen or party to the proceedings is not allowed to represent as party-in-person by submitting the Power-of-Attorney unless one is an Advocate of the Court or in other circumstances, the party himself can appear as party-in-person, but the family members of the party to the proceedings cannot be permitted to represent the case in the Court proceedings. However, Mr.Kaushik, father of respondent, submitted that his son is not in a position to remain present since, as per Mr.Kaushik, the life of his son is in danger and the father of the respondent, Jagdish P. Kaushik also submitted that he was permitted to represent the case before the Apex Court on behalf of his son even in the transfer proceedings and, therefore, with a view to see that the respondent

may not be required to bear the cost of engaging Advocate and as the father wanted to represent the case on behalf of his son, who is the respondent in this petition, I have allowed Mr.Kaushik, father of the respondent to represent the case of the respondent in this proceedings in the interest of justice.

3. Mr.Dave, learned Counsel for the ptitioner, submitted that the petitioner and the respondent, after their marriage have not, at any point of time, resided at Vadodara and the marriage was solemnised at Ghaziabad and after the marriage, the petitioner and the respondent were staying at Ghaziabad as wife and husband and thereafter it is the case of the petitioner that she was physically beaten and the injury was caused and, therefore, there was dispute for which crminal complaint has also been filed and the respondent and the family members of the respondent were reported as shifted to Vadodara. Mr.Dave also submitted that the father and mother of the respondent are released on bail, but the respondent who is husband is still absonding. He submitted that there is correspondence between the Advocate by way of notice, which is a part of the record in the proceedings of divorce petition which goes to show that the wife and the husband have not resided at Vadodara at any point of time and, therefore, it is submitted that the Court at Vadodara will not have jurisdiction and the learned Judge ought to have returned the petition to the respondent for presenting before appropriate court, or ought to have dismissed on the ground of want of jurisdiction.

4. Mr.Jagdish P. Kaushik, on behalf of the respondent, submitted that the allegations of physically beating the wife is not correct and on the contrary, it is his say, that he has lost a part of his left hand due to injury caused by the relatives of the petitioner and he also submitted that the respondent and the family members of the respondent are not in a position to go and reside at Ghaziabad since they find that the lives of all, including the respondent, are in danger. He also submitted that a part of cause of action has arisen within the jurisdiction of Vadodara Court and, therefore, the divorce petition which is filed should be allowed to proceed at Vadodara, since the Court has jurisdiction at Vadodara.

5. So far as the allegations and counter allegations of causing physical injuries, mental cruelty and other aspects are concerned, there are various proceedings filed and counter filed by both the sides and they are of

not much relevance for the purpose of the present petition and, therefore, the said aspects are not required to be dealt with in this petition. The only aspects which may be required to be considered by this Court is whether the Court has jurisdiction to entertain and try the petition or whether any error apperant on the face is committed by the Judge in holding that it has jurisdiction to entertain and try the petition by the impugned order or whether error apperant on the face is committed by the learned Judge in rejecting the application of the petitioner for deciding the preliminary issue on the question of jurisdiction.

6. When specific question was put to Mr.Kaushik, father of respondent by the Court as to whether the husband and wife namely the respondent and the petitioner have, at any point of time, resided at Vadodara ? The answer by him was in negative and he stated that they have not resided at Vadodara, but his submission is that a part of cause of action has arisen in Vadodara. Therefore, it appears that there is no dispute on the point that the marriage was solmenised at Ghaziabad and after marriage husband and wife resided at Ghaziabad and at any point of time they have not resided as husband and wife at Vadodara. Section 19 of Hindu Marriage Act reads as under:

"19. Court to which petition shall be presented. - Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction -

(i) the marriage was solemnised, or
(ii) the respondent, at the time of the presentation of the petition, resides, or
(iii) the parties to the marraie last resided together, or
(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of his if he were alive."

7. On plain and simple reading of the language it is apperant that the petition can be presented to the Court within whose local limits of jurisdiction either marriage

was solemnised or the parties to the marriage last resided or the respondent is staying outside the territory to which the Act is applicable or the respondent is not heard as being alive as for seven years or more. It is an admitted position that the marriage is solemnised at Ghaziabad. It is also an admitted position that the respondent in the original petition before the Court concerned, who is wife and petitioner herein at the time of presentation of the petition and even as on today is staying at Ghaziabad. Even the respondent in this petition has shown the address at Ghaziabad. It is also an admitted position that after marriage the parties have last resided together at Ghaziabad and it is not a case where the respondent, who is wife, is residing outside the territory to which the Act applies (outside the territory of India as per Section 1(2) of the Hindu Marriage Act), nor is it the case that respondent wife is not alive. Therefore, the petition cannot be presented to the Court at Vadodara as per Section 19 of the Act.

8. Section 19 is a source of power conferring the jurisdiction upon the Court and there is express provision for the purpose of jurisdiction of the Court which can entertain and try the petition under the Act. Therefore, when there is express provisions under the Act, the provisions of Section 20 of the Code of Civil Procedure cannot be made applicable in normal circumstances while considering the jurisdiction of the Court to try Hindu Marriage petition. Had it been a case where any of the conditions under Section 19 of the Act is satisfied within the jurisdiction of more than one Court, then possibly the question may arise for applicability of Section 20 of CPC. For example, after the marriage the parties have resided at different places for different periods or the respondent has resided at a different place. As on facts such is not the case, I find that under such circumstances what shall be the applicability of Section 20 in context to the scope and ambit of Section 19 of the Act is a question which may be decided in appropriate case. But in the present case no such circumstances exist and on the plain reading of Section 19 of the Act none of the conditions conferring the jurisdiction to the Court to which the petition is presented is satisfied. Therefore, when there is no dispute on the factual aspects, it cannot be said that there will be any applicability of Section 20 in the present facts and circumstances. Moreover, when there is express provision conferring the jurisdiction the applicability of Section 20 of CPC cannot be read, in any case, so as to nullify the effect of Section 19 of the Act. Even in the decision of "Smt. Jeewanti Pandey v.

Kishan Chandra Pandey", reported in AIR 1982 SC, 3, upon which reliance was placed by the petitioner herein before the lower Court, the Apex Court has found that when the parties to the marriage got married at New Delhi and wife resided with her uncle in Delhi ever since the marriage and the husband was also resident of Delhi being employed there, the petition before the District Judge at Almora is not maintaible and the Court would not have jurisdiction to try the petition. It appears that the learned Judge has not considered the basic law of precedent in as much as when there is decision of the Apex Court, more particularly after 1973 after the decision of Madras High Court, reported in AIR 1973 Madras, 247, he is bound by the decision of the Apex Court and it was not proper on his part to rely upon the decision of Madras High Court reported in AIR 1973 Madras, 247 in the case of "M. Gomathi v. S. Natarajan". Further, even if the decision of the Madras High Court in the case of "M. Gomathi v. S. Natarajan" (supra) is for taking the view that the question of applicability of Civil Court's jurisdiction may arise when it is impossible to conclude on the question of jurisdiction as per Section 19 of Hindu Marriage Act. Further at paragraph 7 it has also been recorded by Madrass High Court that as the defendent is partly residing within the jurisdiction of Civil Court and, therefore, it was held that the said Civil Court will have the jurisdiction. Such is not the case even in the present case and the decision upon which the order is based by the learned Civil Judge of Madras High Court is even otherwise also cannot be said as the view taken for applicability of the provisions of Code of Civil Procedure under Section 20 so as to nullify the effect of Section 19 of the Hindu Marriage Act.

9. When on factual aspects there is no dispute and if on the facts it can be said that the Court to which the petition is presented has no jurisdiction under Section 19 of the Act, it was not proper for the learned Civil Judge to reject the application on the ground that it is a mixed questions of law and fact and, therefore, I find that the learned Civil Judge has committed error apperant on the face of record in ignoring the effect of Section 19 of the Act confering the jurisdiction and has also passed the order which can be said as contrary to not only the statutory provisions of Section 19 of the Act, but also by not following the sound principles of judicial discipline in not properly giving effect to the law laid down by the Apex Court in the case of "Smt. Jeewanti Pandey v. Kishan Chandra Pandey", reported at AIR 1982 SC, 3.

10. In view of the above, I find that the impugned order passed by the learned Civil Judge below Ex. 10 cannot be sustained in the eye of law and the Court of Civil Judge (S.D.) at Vadodara has no jurisdiction to entertain the Hindu Marriage Petition No.203/2001.

11. The petition shall stand allowed. It would be open to the Court concerned to return the papers of the petition to the respondent herein for presenting before the Court which has jurisdiction as per Section 19 of the Hindu Marraige Act or the respondent may present the petition before the Court having jurisdiction to entertain the petition as per Section 19 of the Act. Rule made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs.

29.1.2005 (Jayant Patel, J.)

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